Khidmas Capital Sdn Bhd & Anor v NRB Holdings Ltd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO W–04–402 OF 2004, NO W–04–383 OF 2005 AND NO W–04–907 OF 2005
GOPAL SRI RAM, AZMEL AND MOHD NOOR ABDULLAH JJCA
13 MARCH 2006

Civil Procedure — Mareva injunction — Application for — Injunction freezing defendant's assets worldwide — Whether evidence of negotiation between parties proved — Whether clear case for grant of freezing order

The plaintiff (respondent) was a South African company in liquidation. Its liquidator brought this action in its name for the recovery of certain shares worth several million ringgit which belonged to it. The crux of the plaintiff's claim was that the shares were moved out of the plaintiff's hands and into the hands of the first defendant (first appellant) by the second defendant (the second appellant) who at all material times stood in a fiduciary position vis a vis the plaintiff. There was also an assertion that the first defendant was the alter ego of the second defendant. The plaintiff invoked its equitable right as the beneficial owner of the property to trace that property into the hands of a third party. The plaintiff obtained an ex parte for an injunction freezing the defendant's assets worldwide. The judge who granted the order did not produce any written reasons for his decision.

In the appeal, learned counsel for the defendants attacked the freezing order on two grounds. First, that there was no urgency in the matter warranting the making of the order; and second that there had been non-disclosure of material facts by the plaintiff. As for the first ground, it was urged that there was nothing urgent warranting the making of an application because: (1) there were negotiations afoot between the parties; (2) this was not a case where the defendants had engaged the plaintiff in negotiations while quietly dissipating its assets; and (3) the plaintiff had, in any event already obtained an order restraining the first defendant from disposing of the shares which were the primary target of the plaintiff's claim. In answering this submission, learned counsel for the plaintiff took the court through documentary evidence in the appeal record that reasonably supported a want of good faith and forthrightness on the part of the defendants.

Held, dismissing the appeals:

(1) This court could not properly exercise its appellate function without having before it the High Court's reasons for exercising its discretion (see para 6). However, having considered the facts and evidence very carefully, this court was satisfied that there were sufficient grounds for the plaintiff to fear a dissipation of assets warranting the making of an urgent application for the freezing order in this case (see para 7).

(2) On the second ground that the plaintiff deliberately failed to disclose to the judge at the ex parte stage that the parties were in the process of negotiating, it was crystal clear from the documents that all negotiations between the parties were conducted after the freezing order had been obtained. The evidence relied on by the appellant as showing that there had been negotiations pre-dating the freezing order was vague and imprecise. A reasonable tribunal properly directing itself would have given that evidence no weight whatsoever. And this was something well within the province of the learned judge in this case (see paras 8 & 10).

(3) The plaintiff had made out an unusually sharp and clear case for the grant of a freezing order (see para 11).

[Bahasa Malaysia summary

Plaintif (responden) adalah sebuah syarikat Afrika Selatan dalam likuidasi. Penyelesainya telah memulakan tindakan ini dalam namanya untuk mendapat balik syer-syer tertentu bernilai beberapa juta ringgit yang merupakan miliknya. Intipati tuntutan plaintif adalah bahawa syer-syer tersebut telah dipindahkan daripada tangan plaintif ke tangan defendan pertama (perayu pertama) oleh defendan kedua (perayu kedua) yang pada setiap masa material berada dalam satu kedudukan fidusiari vis a vis plaintif. Terdapat juga penegasan bahawa defendan pertama adalah alter ego defendan kedua. Plaintif telah menggunakan hak ekuitinya sebagai pemilik benefisiari hartanah untuk mengesan hartanah tersebut di tangan pihak ketiga. Plaintif telah memperoleh satu ex parte untuk injunksi membekukan aset-aset defendan di seluruh dunia. Hakim yang memberikan perintah tidak mengemukakan apa-apa alasan bertulis untuk keputusannya.

Dalam rayuan tersebut, peguam yang bijaksana bagi pihak defendan-defendan telah menyerang perintah pembekuan itu atas dua alasan. Pertama, bahawa tidak keperluan untuk membuat tindakan segera dalam perkara yang mewarankan pembuatan perintah itu, dan kedua bahawa terdapat ketidakdedahan fakta-fakta penting oleh plaintif. Berhubung alasan pertama, ia ditegaskan bahawa tiada apa-apa yang penting untuk disegerakan yang mewarankan pembuatan satu permohonan kerana: (1) terdapat perbincangan antara pihak-pihak; (2) ini bukan satu kes di mana defendan-defendan telah melantik plaintif dalam perbincangan tatkala melenyapkan aset-asetnya dengan senyap; dan (3) plaintif telah, dalam apa keadaan telahpun memperoleh satu perintah menghalang defendan pertama daripada menjual syer-syer tersebut yang merupakan sasaran utama tuntutan plaintif. Dalam menjawab hujah ini, peguam yang bijaksana bagi pihak plaintif membawa kepada keterangan dokumentari dalam rekod rayuan yang menyokong secara munasabahnya keperluan adanya kejujuran dan sikap terus terang di pihak defendan-defendan.

Diputuskan, menolak rayuan-rayuan tersebut:

(1) Mahkamah ini tidak menggunakan fungsi rayuannya dengan betul tanpa di hadapannya alasan-alasan Mahkamah Tinggi untuk menggunakan budi bicaranya (lihat perenggan 6). Namun, setelah mempertimbangkan fakta dan keterangan dengan teliti, mahkamah ini berpuas hati bahawa terdapat alasan

mencukupi untuk plaintif bimbang satu pelesapan aset-aset yang mewarankan pembikinan satu permohonan yang memerlukan tindakan segera untuk perintah pembekuan kes ini (lihat perenggan 7).

(2) Berhubung alasan kedua yang mana plaintif dengan sengaja telah gagal untuk kemukakan ke hadapan hakim di peringkat ex parte bahawa pihak-pihak dalam proses perundingan, ia adalah jelas berdasarkan dokumen-dokumen bahawa semua perundingan antara pihak-pihak telah dilakukan selepas perintah pembekuan diperoleh. Keterangan yang digunakan oleh perayu sebagai menunjukkan bahawa telah ada perundingan sebelum perintah pembekuan wujud adalah tidak terang dan tidak tepat. Suatu tribunal yang munasabah yang mengarah akan memutuskan keterangan tersebut tiada beban apa sekalipun. Dan ini suatu yang dalam bidang kuasa hakim yang bijaksana dalam kes ini (lihat perenggan 8 & 10).

(3) Plaintif telah membuktikan satu kes yang jelas untuk pemberian perintah pembekuan (lihat perenggan 11)]

Notes

For a case on an application for Mareva injunction, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 4232.

Cases referred to

Bloch v Bloch (1981) 37 ALR 55 (refd)
Collier-Garland (Properties) Pty Ltd v Northern Transport Co Pty Ltd (1964) 82 (NSW) WN (Pt 1) 125 (refd)
Dinsdale v R (2000) 202 CLR 321 (refd)
House v The King (1936) 55 CLR 499 (refd)
Lovell v Lovell (1950) 81 CLR 573 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Keet Gerald v Mohd Noor bin Abdullah [1995] 1 MLJ 193 (refd)
Maxwell v Keun [1928] 1 KB 645 (refd)
Mohamed Zainuddin bin Puteh v Yap Chee Seng [1978] 1 MLJ 40 (refd)
Sari Artists Film Productions Sdn Bhd v Malaysia Film Industries Sdn Bhd [1974] 1 MLJ 123 (refd)
Uttar Pradesh Co-operative Federation Ltd v Sunder Bros AIR [1967] SC 249 (refd)
Walker v Walker [1967] 1 WLR 327 (refd)

Appeal from: Civil Suit No D7–22–1909 of 2003 (High Court, Kuala Lumpur)

Raja Abdul Aziz Addruse (TS Lim with him) (Chooi & Co) for the appellants.
Dato' Loh Siew Cheang (P Gananathan, Olivia Loh and Kelvin Seet with him) (Bodipalar Ponnudurai Nathan) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] There are three appeals before us. They all arise from a *Mareva* or freezing injunction granted by the High Court. One is directed against the grant of the order

ex parte; the other is against the dismissal of the defendants' application to set aside the injunction; the third is against the refusal of the judge to vary the terms of the injunction. By consent the parties agreed to go forward on the appeal directed against the grant of the assets freezing injunction. But let me first say a few words about the factual matrix against which these appeals lie.

[2] The plaintiff (respondent before us) is a South African company. It is in liquidation. Its liquidator has brought this action in its name for the recovery of certain shares worth several million ringgit which belong to it. The crux of the plaintiff's claim is that the shares were moved out of the plaintiff's hands and into the hands of the first defendant (first appellant before us) by one Dato' Samsudin bin Abu Hassan, the second defendant (the second appellant before us) who at all material times stood in a fiduciary position *vis a vis* the plaintiff. There is also an assertion that the first defendant is the alter ego of the second defendant. The method or process invoked by the plaintiff is the equitable right in the beneficial owner of property to trace that property into the hands of a third party. The primary remedy that has been sought is a declaration. The plaintiff became afraid that the first defendant would dissipate its assets it owns across the globe to frustrate any judgment that may be obtained. So, it moved ex parte for an injunction freezing the defendant's assets worldwide. The judge who heard the plaintiff's summons granted the order. Later, he refused to set aside that order or to vary it.

[3] The learned judge did not, however, produce any written reasons for his decision. This greatly hampered our task. For, as an appellate court in a matter such as this which involves the exercise of discretion our initial function is one of review only. We do not possess any original discretion. It is not our function to undertake a study of all the affidavits and exhibits filed in the court below to arrive at a conclusion as to how each of us in this court would have exercised the discretion and then to see if our view matches that of the judge at first instance.

[4] The law on the point is clear and beyond argument. It is for an appellant to demonstrate that the High Court — the repository of the original discretion — did not exercise it in accordance with law. That is to say, that it did not take into account relevant considerations or took into account irrelevant considerations or asked itself the wrong question or misinterpreted a provision of written law. Further, even if the precise nature of the error is not discoverable, it is sufficient for an appellant to demonstrate that the result arrived at by the judge is so unreasonable or plainly unjust so that we may infer that there has been a failure properly to exercise the discretion. See *House v The King* (1936) 55 CLR 499 at pp 504–505; *Lovell v Lovell* (1950) 81 CLR 573 at pp 532–534; *Rodgers v Rodgers* (1964) 114 CLR 608 at pp 619–620; *Dinsdale v R* (2000) 202 CLR 321. Lastly, even if an appellant is unable to bring home any of the foregoing matters, we are nevertheless under a duty to review the order made and to intervene if we are satisfied that there has been an injustice to one of the parties as a result of the judge's exercise of discretion. See, *Maxwell v Keun* [1928] 1 KB 645 at p 653; *Walker v Walker* [1967] 1 WLR 327 at 330; *Collier-Garland (Properties) Pty Ltd v Northern Transport Co Pty Ltd* (1964) 82 (NSW) WN (Pt 1) 125 at p 127; *Bloch v Bloch* (1981) 37 ALR 55 at pp 58–59.

[5] For completeness I refer to *Uttar Pradesh Co-operative Federation Ltd v Sunder Bros* AIR [1967] SC 249 where Ramaswami J when delivering the judgment of the Indian Supreme Court said:

> In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion. This principle is well established …

[6] It must therefore be appreciated that we cannot properly exercise our appellate function without having before us the High Court's reasons for exercising its discretion in the way in which we did. To say this is not a failure on our part to realise the burden of the heavy workload that judges of the High Court bear, faced as they are by appeals against almost all the orders they make. In such circumstances, it is unrealistic to require them to produce detailed reasoned judgments such as those written after a full trial in a witness action. That is not what we expect of them. In *Keet Gerald v Mohd Noor bin Abdullah* [1995] 1 MLJ 193, this court recognised that all that is required of judge hearing an application for an injunction is to briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion as to where the balance of the justice of the particular case lies.

[7] In the present instance, learned counsel for the defendants attacked the freezing order on two grounds. First, that there was no urgency in the matter warranting the making of the order; and second that there had been non-disclosure of material facts by the plaintiff. As for the first ground, it was urged that there was nothing urgent warranting the making of an application because (i) there were negotiations afoot between the parties; (ii) this was not a case where the defendants have engaged the plaintiff in negotiations while quietly dissipating its assets; and (iii) the plaintiff had, in any event already obtained an order restraining the first defendant from disposing of the shares which were the primary target of the plaintiff's claim. In answering this submission, learned counsel for the plaintiff took us through documentary evidence in the appeal record that reasonably supports a want of good faith and forthrightness on the part of the defendants. Having considered the facts and evidence very carefully, this court was satisfied that there were sufficient grounds for the plaintiff to fear a dissipation of assets warranting the making of an urgent application for the freezing order in this case.

[8] Now for the second ground. The main criticism here is that the plaintiff deliberately failed to disclose to the judge at the ex parte stage that the parties were in the process of negotiating. This is indeed a material fact which, if disclosed, would have led a reasonable tribunal to refuse to entertain the ex parte application. The failure to disclose such a fact as this has serious consequences. And all that I need

do is to quote from the judgment of Hashim Yeop A Sani J (as he then was) in *Sari Artists Film Productions Sdn Bhd v Malaysia Film Industries Sdn Bhd* [1974] 1 MLJ 123 where that very learned judge said (at p 124):

> The granting of an injunction is a discretion of the court. It is essential that the party asking the court to exercise its discretion makes available to the court all facts which might be material for the consideration of the court before exercising its discretion. In *Clifton v Robinson* 16 Beav 355; 51 ER 816, it was held that the fact that the plaintiff had forgotten the circumstance was no excuse for the suppression of a material fact in an application for an ex parte injunction. In *Hilton v Lord Granville* 4 Beav 137; 49 ER 290, the Master of the Rolls (Lord Langdale) succinctly described the duty of the plaintiff when asking for an injunction:
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> > The rights asserted on the part of the plaintiff and of the defendant are legal rights; and the plaintiff, asking for the assistance of a Court of Equity to protect him from a violation of his alleged legal right, ought to shew that the right has been established, or that, having had no means of establishing it, but the right being prima facie well founded, the interference of this court is necessary, to prevent that species and extent of mischief, which this court calls irremediable, before the right can be established by legal proceedings. In this case, it appears that the plaintiff, personally, has not had any opportunity of establishing his right at law; and, therefore, the question is, what is the result of the evidence now adduced, as to the right which he claims, and as to the nature and extent of damage, with which he is threatened, if his claim of right appears to be well founded.
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> It was held that where a plaintiff, upon an application for an ex parte injunction, suppresses material facts, the injunction will bee dissolved on that ground alone.

[9] The same learned judge in *Mohamed Zainuddin bin Puteh v Yap Chee Seng* [1978] 1 MLJ 40 said this (at p 41):

> The sole ground on which the notice of motion is based is of course as set out in paragraph (a) of the defendant's affidavit, that is to say, that the plaintiff had not stated the facts fully and accurately and that the plaintiff had not disclosed all material facts. It is an established law that the court in an application of this nature must be satisfied that the person who asked for the interlocutory injunction did not mean to deceive the court and that the court is bound to maintain the principle that those who come 'asking ex parte for injunctions must proceed with the highest good faith, and keep back no material facts.' — see *Schmitten v Faules* [1893] WN 64. This standard has been maintained strictly and it was even held that when a party comes for an injunction there is no obligation upon him to ascertain what are the important facts of the case and it is no excuse to say that the party does not consider the facts to be important. The party applying for ex parte injunction is bound to state not only the facts that he considers material but all facts within his knowledge that are material and therefore if it is shown that a plaintiff had innocently omitted to state circumstances which turn out to have material bearing upon his rights the injunction should be dissolved — see *Daglish v Jarvie* (1851) 20 LJ Ch 475.

[10] Having examined the evidence, we were satisfied that there was really nothing in complaint about non-disclosure. It is crystal clear from the documents that all negotiations between the parties were conducted *after* the freezing order had been obtained. The evidence relied on by the appellant as showing that there had been negotiations pre-dating the freezing order is vague and imprecise. A reasonable

tribunal properly directing itself would have given that evidence no weight whatsoever. And this is something well within the province of the learned judge in this case. See, *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 where the Privy Council approved the rejection by the first instance judge in an interlocutory proceeding of vague and imprecise assertions.

[11] Having regard to the material that had been placed before the learned judge as well as the argument before this court, my learned brothers and I were of the unanimous view that the plaintiff had made out an unusually sharp and clear case for the grant of a freezing order. In the circumstances, the learned judge was correct in granting the freezing order and in refusing to set aside or to vary it. The appeals were devoid of any merit and were dismissed with the usual consequential orders that follow a dismissal.

[12] My learned brothers, Azmel and Mohd Noor Abdullah JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeals dismissed.

Reported by Loo Lai Mee